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Fall 1993

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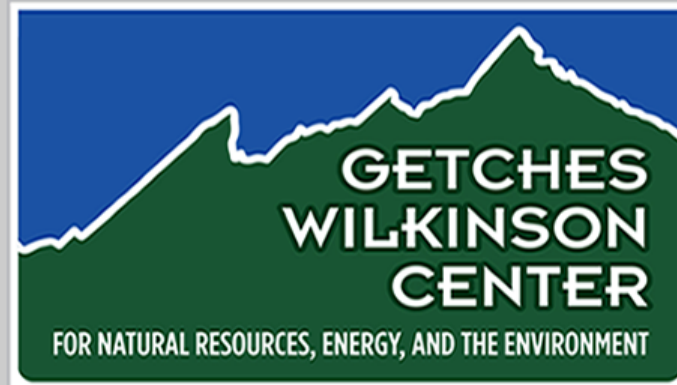
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(Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).

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RESOURCE LAW NOTES

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Number 29

Fall Issue, August 1993

George Miller, Thomas Lovejoy Featured Speakers at Fall Conference on Public Lands Policy

What direction should public lands laws and policies take in the next decade? What actions can Congress and the Administration pursue to achieve long-term sustainability of the nation's public resources? What are the roles of state, tribal, and local governments, private landowners, and non-governmental organizations? These questions frame the debate surrounding the public land resource that, as Wallace Stegner wrote, "gives Westerners so much of their outdoor pleasure and many of their special privileges and a lot of their pride and self-image."

The future of the western public lands will be the focus of the Natural Resources Law Center's conference, "A New Era for the Western Public Lands," September 19-21, 1993, in Boulder, Colorado. The conference will feature presentations by prominent public lands experts and active audience participation in facilitated discussion sessions.

The opening evening will begin with a keynote address by Congressman George Miller, the chairman of the Natural Resources Committee of the U.S. House of Representatives. Responding to his remarks and providing their own visions for the future of the western public lands will be Bureau of Land Management Director Jim Baca, Department of the Interior Solicitor John Leshy, Council of Energy Resource Tribes Executive Director David Lester, and Western Governors' Association Director of Programs Jo Clark. The evening will wrap up with a reading by Gary Holthaus, Director of the Center of the American West at the University of Colorado.

The lunch speaker on Monday will be the internationally-recognized conservation ecologist Thomas Lovejoy, Assistant Secretary of the Smithsonian Institution who is presently serving as Science Advisor

to Interior Secretary Bruce Babbitt. Lovejoy is charged with evaluating the feasibility of a biological survey, a new entity that may have far-reaching effects on public land management approaches.

During the three substantive sessions, conference participants will explore the next generation of public lands policies that must be developed and implemented to address today's pressing issues. The sessions and speakers will include:

- *The Changing Context of Public Lands Policy*: The discussion will explore the changing economic importance of the public lands and the effects these changes are having on existing laws and policies. Speakers will describe the growing importance of non-extractive uses and values of the public lands and the pressures facing

public land stewards from federal budgetary constraints.

Speakers for this session include Phil Burgess (Center for the New West), John DeVilbiss (U.S. Forest Service), Frank Gregg (University of Arizona, and former BLM Director), Robert Nelson (U.S. Department of the Interior Office of Policy Analysis), and Ray Rasker (The Wilderness Society).

- *Public Rights Meet Private Rights*: The session will address the nature of private rights to develop or otherwise use the resources occurring on public lands. Speakers will interpret the changing views toward public regulation of private resource use, recent litigation concerning property rights, and proposed legislation in western states.

This session will feature Michael Brennan (Holland & Hart), James Huffman (Lewis & Clark Law School), Marla Mansfield (University of Tulsa College of Law), and Gale Norton (Colorado Attorney General).

- *Beyond Boundaries: Ecosystems and Public Land Management*: Speakers will examine emerging ideas about ecosystems, watershed-based planning, and the role of human communities in public land management, focusing on how governing institutions can be adapted to fit ecologists' understanding of natural systems functions.

Speakers on this topic include Reeves Brown (Colorado Cattlemen's Association), Robert Keiter (University of Wyoming College of Law), William Lewis (University of Colorado Department of Environmental, Population & Organismic Biology), Will Murray (The Nature Conservancy), and Jim Ruch (Grand Canyon Trust).

The final session will be a discussion (facilitated by University of Colorado Law Professors David Getches and Charles

continued on page 2



Betsy Rieke, newly appointed Interior Department Assistant Secretary for Water & Science, was a lunch speaker at the 14th annual water law conference, "Water Organizations in a Changing West," June 14-16. More photos on page 3.

Hot Topics for Fall Begin With Colorado Mining Law Reform

The Center announces the following programs for its fall Hot Topics in Natural Resources series:

September 30: *After Summitville: The Colorado Mined Land Reclamation Act of 1993*: Denver attorney **Luke Danielson**, member of the Colorado Mined Land Redamation Board, will provide background on and moderate a discussion of Colorado's recently-enacted legislation concerning reclamation of mined lands. Speakers will include Boulder attorney **Roger Flynn** (who represented the environmental community as the bill was drafted) and **Dean Massey** (Parcel, Mauro, Hultin & Spaanstra, Denver).

October 19: *Clean Water Act Reauthorization*: What will Congress be considering in the upcoming reauthorization of the Clean Water Act? This program will focus on watershed planning as a strategy to prevent nonpoint source pollution. Denver

Fall Conference

continued from page 1

Wilkinson) of the themes and ideas developed during the program. The conference will close with observations and a reading by **Don Snow**, Director of the Northern Lights Research & Education Institute.

"A New Era for the Western Public Lands" will bring together individuals from the new Administration, public resource agencies, commodity user groups, public interest groups, academia, state, tribal, and local governments, and elsewhere who share concerns for the lands, communities, and natural resources of the West. Such national dialogue is essential in this exciting and challenging time of change.

The Center is pleased to co-sponsor this conference with the University of Colorado Law Review. The Law Review will publish a symposium issue composed of articles written by speakers participating in the program. This collaborative effort was made possible by the generous support of University of Colorado School of Law Dean **Gene R. Nichol** and University of Colorado Chancellor **James N. Corbridge, Jr.**

Registration for the two-day program costs \$250. Discounts are available for individuals employed by government agencies, non-profit organizations, and academic institutions. To obtain more information on the conference, contact Natural Resources Law Center Conference Coordinator **Katherine Taylor**, (303) 492-1288.

attorney **Paul Frohardt**, who until recently served as Administrator of the Colorado Water Quality Control Commission, will introduce the topic and moderate the discussion. Speakers will include **Mark Pifher** (Counsel, City of Colorado Springs) and **Dan Luecke** (Environmental Defense Fund).

November 16: *What's New From the Colorado Air Quality Control Commission*: The Commission is promulgating an operating permit program that will affect a wide variety of sources. Come hear how the new regulations will impact your organization or your clients, and ask questions about other

recent developments. Speakers will include **Dave Ouimette** (Colorado Air Pollution Control Division), **Robert Connery** (Holland & Hart), and **Rich McClintock** (Colorado Public Interest Research Group).

These programs are all held at noon at the 32nd floor conference room at Holland & Hart, 555 17th Street, Denver. (Please note the new location.) Registration will be limited, due to space restrictions. Brochures will be sent to people on our mailing list in the Denver metropolitan area. Others wishing to receive more information should contact **Kathy Taylor**, (303) 492-1288.

June Water Conference Brings Together Representatives of Diverse Organizations

On June 14-16, the Center convened its fourteenth annual water conference, this year focusing on "Water Organizations in a Changing West." Speakers drawn from a wide variety of organizations (from rural *acequia* associations to regional urban water supply organizations) shared their experiences with an audience of 168 people.

In addition to the regular sessions, conference participants heard lunchtime presentations from **Betsy Rieke**, Assistant Secretary of the Interior for Water and

Science, and **Tom Jensen**, Vice President and Executive Director of the Grand Canyon Trust (formerly counsel to the U.S. Senate Water and Power Subcommittee).

Natural Resources Law Center Associates were invited to a special breakfast with selected speakers on the second morning of the conference.

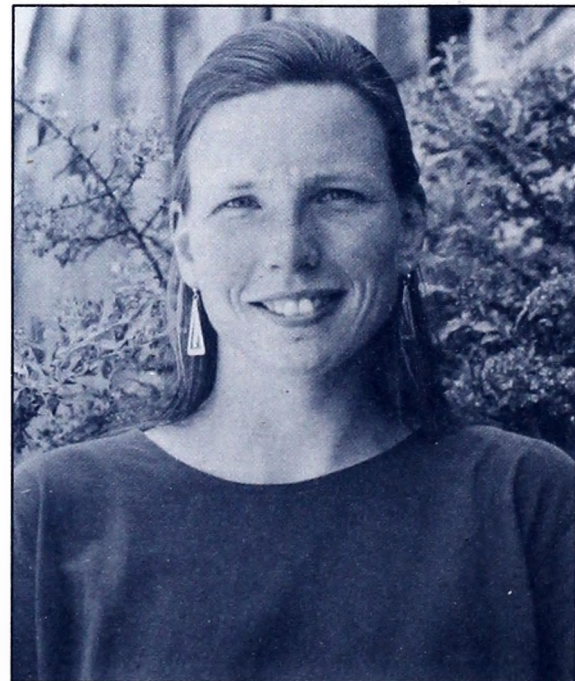
Photos from the conference appear on page 3. The topic and dates of next year's water conference will be announced in the next issue of *Resource Law Notes*.

Ellen Kohler Named Outstanding Natural Resources Law Graduate

At the May 1993 University of Colorado School of Law commencement ceremony, graduating student **Ellen Kohler** was honored as the Natural Resources Law Center Outstanding Natural Resources Graduate. Ellen's excellent academic performance, contributions as a leader of the Environmental Law Society, and promise as a natural resources lawyer all made her an obvious choice for this recognition.

Ellen worked at the Center as a research assistant during the summer following her first year of law school. Her work was instrumental in developing the first Western Lands Report, *The Western Public Lands: An Introduction*. She then was a research assistant for Professor Charles Wilkinson. She now is headed to Washington, D.C., where she will work for the U.S. Department of Justice on natural resources issues.

Last year the Center honored **Patricia Moore** at our decennial program as the outstanding natural resources law graduate.



Ellen Kohler, NRLC Outstanding Natural Resources Law Graduate

Patti is now employed by the IUCN Environmental Law Centre in Bonn, Germany.

June Water Conference



Bill McDonald, Director, Denver Operations,
Bureau of Reclamation

◀ Coffee breaks provide time to continue the discussion.



◀ Dennis Chavez,
Rio Mimbres
Acequia Association,
New Mexico



◀ Duane
Georgeson,
Assistant
General
Manager,
Metropolitan
Water District
of Southern
California



▲ Children of speakers and
participants enjoy the traditional
Flagstaff Mountain cookout.



▲ Hamlet (Chips) Barry, Manager,
Denver Water Commissioners



▲ Monday lunch speaker Tom
Jensen, Executive Director of the
Grand Canyon Trust, enjoys the
Flagstaff cookout.



◀ Patricia Mulroy,
General Manager of
the Las Vegas Valley
Water District and the
Southern Nevada
Water Authority

Law Student Research Assistants Contribute to Center's Productivity

Visitors to the Center are often surprised at the small size of our staff. With just three lawyers in the office, it is a challenge to keep up with multiple research and writing projects, as well as to organize conferences and other educational programs.

One of the keys to our productivity is our student research assistants, a group of second- or third-year law students who work at the Center part time during the school year or full time during the summer. They read and analyze legislation, government documents, and books, and spend many hours on the telephone interviewing people involved in natural resources issues throughout the country.

This summer we are fortunate to have four top-notch researchers: Beth Doherty, Roberta Hoy, Sharyl Kammerzell, and Dan Reimer. They are



NRLC Research Assistants (left to right): Roberta Hoy, Sharyl Kammerzell, Beth Doherty, and Dan Reimer

NRLC Student Assistants Marco Chayet and Amberly Scheppach



spending most of their time researching and writing up case studies describing environmental uses of water at Bureau of Reclamation facilities, although a variety of other projects are also competing for their attention.

In addition to the law students, this summer we have enjoyed the invaluable assistance of undergraduate student assistants Amberly Scheppach and Marco Chayet. These two have filled orders for publications, worked at Center conferences, and otherwise helped to make Kathy Taylor's job a little easier.

Center Announces New Books and Report

This fall, Island Press will publish two new Natural Resources Law Center books. The first is *Searching Out the Headwaters: Change and Rediscovery in Western Water Policy*, written by Sarah Bates, David Getches, Lawrence MacDonnell, and Charles Wilkinson. Originating with the Center's Ford Foundation-funded Western Water Policy Project, the book begins by tracing the evolution of the uses of western water, exploring the special qualities of the waters of the West, describing the changing West, and identifying the many contemporary communities of interest and the varied ways in which they view and care about water. It then describes the authors' vision of how decisionmaking might be opened up in order to accommodate the views and needs of the whole community — a vision based on a "water ethic" including elements of conservation, equity, and ecology.

The second new book is a collection of essays drawn primarily from the Center's ten-year anniversary symposium last year. Edited by Lawrence MacDonnell and Sarah Bates, the book is called *Natural Resources Policy and Law: Trends and Directions*. It includes chapters by George Cameron Coggins, David Getches, Richard Lazarus, Lawrence MacDonnell (who also wrote a chapter with Sarah Bates), Clyde Martz, Richard Maxwell, Joseph Sax, Dan Tarlock, and Charles Wilkinson.

Unlike our other publications, these books are not available from the Center, but must be purchased from Island Press or from bookstores. Island Press has a toll-free telephone number for book orders: 1-800-828-1302. (Orders outside the U.S. should call 707-983-6432.) Call between 8:00 a.m. and 5:00 p.m., Pacific Coast time.

In addition to these new books, a

completely revised edition of "Instream Flow Protection in the West" will be available from the Center in September 1993. Originally published in 1989 as a book, the revised edition is being made available as a Center research report. Every chapter has been substantially revised and updated to reflect the many important changes and developments in this rapidly evolving area of law and policy. The report provides a comprehensive, up-to-date analysis of the laws and programs in western states providing protection for the environmental values of water. It includes individual state chapters written by experts from the state as well as broader chapters on issues such as instream flow evaluation methodologies, the economic values of instream flows, the public trust and instream flows, and the federal role in streamflow protection.

Natural Resources Litigation: A Dialogue on Discovery Abuse and the New Federal Rules

In January, 1993, Colorado Supreme Court Justice George Lohr and Denver Attorney Nancy Gegenheimer participated in the Center's Hot Topics in Natural Resources program entitled "Ethical Considerations in Discovery." The following two articles, edited by NRLC Senior Staff Attorney Teresa Rice, grew out of the authors' contribution to the program.

Justice Lohr discusses prevailing discovery abuses and the related rise in the cost of litigation, and considers proposals for reform. Since our January program, the Supreme Court adopted one of these proposals, amending the Federal Rules of Civil Procedure. Nancy Gegenheimer describes these amendments and assesses whether they are likely to ameliorate the abuses described by Justice Lohr.

Ethical Considerations in Discovery

George E. Lohr*

As viewed from an appellate bench, the evidence is persuasive that discovery abuse is common and is contributing to the more general problem of rising costs of litigation. This has given rise to a variety of reforms and proposals for reform, ranging from fine tuning to fundamental changes. It behooves both the legal profession and the judiciary to evaluate the seriousness of the problem and to ask ourselves what can and should be done to address it without losing the benefits that liberal discovery has to offer.

The original concept was excellent. Notice pleading would result in crisp, taut pleadings. Information necessary for trial would then be developed through the various discovery devices of interrogatories, depositions, and requests for production of documents. With the benefit of full information, parties could realistically assess the strength of their positions, thereby promoting settlement. In appropriate cases, discovery could posture a case for complete or partial summary judgment. If settlement or summary judgment could not be achieved, all parties would go to trial fully prepared, with areas of factual dispute developed and no surprises to be encountered. The overarching goal of just, speedy, and inexpensive resolution of every legal action could thereby be achieved. [*Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947); *Hawkins v. District Court*, 638 P.2d 1372,



Colorado Supreme Court Justice George E. Lohr

1375 (Colo. 1982).]

In order to promote the goal of conducting litigation with the benefit of full information, discovery was allowed a broad scope. Under Rule 26(b), parties could discover not only matter relevant to the claims and defenses developed by the pleadings, but any unprivileged matter relevant to the subject matter of the action. [*Fed.R.Civ.P.* 26(b)(1); *Colo.R.Civ.P.* 26(b)(1).] Inadmissibility at trial was not ground for objection so long as the information sought appeared reasonably calculated to lead to the discovery of admissible evidence. The broad standards of the rules have been reinforced by judicial decisions emphasizing that the rules should be liberally construed to effectuate their truth seeking purpose. [*E.g.*, *Oppenheimer Fund, Inc., v. Sanders*, 437 U.S. 430, 351 (1978); *Kerwin v. District Court*, 649 P.2d 1086, 1088 (Colo. 1982).] In close cases the balance tips in favor of discovery. Litigants seeking protective orders must bear the burden of showing good cause for the protection sought. [*Cameron v. District Court*, 193 Colo. 286, 290, 565 P.2d 925, 927-28 (1977).]

*Associate Justice, Colorado Supreme Court. Prior to serving on the Supreme Court, Justice Lohr was a Water Judge for Division 5 in Western Colorado.

With competent and ethically sensitive counsel on both sides, and especially when the parties' economic circumstances are in parity, discovery appears to work much as it was intended. Unfortunately, the same tools that function well for their intended purpose are fraught with opportunity for abuse.

Abuse should not come as a surprise. After all, by the time a case has been filed the parties are often divided and hostile. The parties, and often their counsel, see the issues in black and white terms; positions are polarized. Parties expect their counsel to be aggressive and to advance their interests with force and tenacity. Counsel have additional pressures. In complex cases there is a fear that a critical fact will remain undiscovered, with the prospect of a case unnecessarily lost, a client exceedingly unhappy, and a malpractice claim to follow.

In this environment, the tools of discovery invite misuse and present the opportunity for abuse. The forms that such abuse can take are familiar:

- discovery much more extensive than necessary for the litigation at hand, taking into account the amount in controversy;
- interrogatories not adapted to the informational needs in the particular litigation but pulled from some other litigation file and employed without modification;
- delay in responding to interrogatories, necessitating motions to compel;
- objections to interrogatories raised to create delay rather than to contain discovery within proper scope;
- evasive and nonresponsive answers, creating the need for motions to compel;
- multiple depositions when a smaller number from persons truly central to the dispute would be adequate;
- abusive examination in the course of depositions;
- unwarranted instructions to the deponent not to answer questions;
- responses to requests for production of documents organized to maximize the possibility that damaging information will be overlooked; and
- assertions of privilege that ultimately cannot be supported.

What is Discovery?

Lawyers involved in litigation use the *discovery* process to obtain facts and information about a case from the opposing party in order to prepare for trial. Discovery includes tools such as:

- *Depositions*, in which a party's or witness' oral or written testimony is taken under oath outside the courtroom;
- *Interrogatories*, which are written questions about the case submitted by one party to the other or to a witness;
- *Requests for admission*, through written statements of facts about the case submitted to an adverse party; those statements that are admitted are treated as having been established and need not be proved at trial;
- *Production of documents or things*;
- *Permission to enter onto another's property*; and
- *Physical and mental examinations*.

The list could go on. Completely off the scale is conduct going beyond abuse, such as suppression or destruction of documents. [See generally, Robert E. Sarazen, *An Ethical Approach to Discovery Abuse*, 4 *Geo. J. Legal Ethics* 459 (1990); William H. ReMine, III, James L. Gilbert, *Discovery—Abuses, Sanctions, and Ethical Concerns*, 23 *Trial* 53 (Jan 1987); *Discovery Abuse: Causes, Effects, and Reform*, 3 *Rev. Litigation* 1 (1982) (summary of the proceedings of the 1982 National Conference on Discovery Reform).]

Multiple motives underlie abuse. In addition to those already mentioned, abuse is particularly inviting when one party has greater economic strength or otherwise has greater staying power than another, for a party may then be induced to settle in order to contain mounting litigation costs. Abusive discovery may be attractive to satisfy an aggressive client who wishes to make things difficult for the other side. Obstructive tactics may be employed to shield damaging information. Some have suggested that lawyers on occasion engage in excessive discovery in order to increase their own fees, especially in difficult economic times.

With such strong and numerous forces impelling abusive discovery practices, how can the problem be addressed? Initially, except for egregious cases, there is the

considerable problem of identifying abuse in a particular case. Is a lawyer engaging in excessive discovery or simply being scrupulously careful to ensure that relevant information is fully developed? Is the lawyer indulging in delaying tactics or simply trying to protect sensitive, confidential information? Are we seeing harassment, or is it persistence in the face of grudging disclosure? Is this delay or simply an effort to obtain reasonable time to respond? Certainly, there are cases where abuse is clear. In many others, however, assessment of the propriety of the conduct may involve a value judgment about which reasonable persons could differ.

Addressing discovery abuse in particular cases at present requires patient resort to a rather extensive array of procedures and remedies available under the Rules of Civil Procedure. Protective orders can be sought to shield privileged material or material outside the bounds of proper discovery, and to protect against oppression or undue burden or expense under Rule 26(c). Orders compelling discovery can be sought under Rule 37. The certifications required of attorneys filing discovery requests—by Federal Rules 11 and 26(g) and by Colorado Rules 11 and 16—provide additional springboards for the imposition of such sanctions. Where such certifications apply, an attorney's signature to a document constitutes a certification that the document "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." [Fed. R. Civ. P. 11; Colo. R. Civ. P. 11.] A violation empowers a court, upon its own initiative or upon motion, to impose a sanction which may include reasonable expenses, including a reasonable attorney fee incurred because of the filing of the document. The sanction may be imposed upon the attorney, the client, or both. [See, e.g., *Chapman & Cole v. ITEL Container Int'l B.V.*, 865 F.2d 676, 680, 685-86 (5th Cir. 1989).] These rules provide a basis for discouraging some forms of discovery abuse by visiting the resultant costs upon the abuser.

Overlapping Rule 11 in discovery matters is Federal Rule 26(g), adopted in 1983, which has no analog in the Colorado rules. This rule provides that every request for discovery or objection made by a party represented by an attorney is to be signed by the attorney and that such signature constitutes a certification that, among other matters, the request or objection is "not interposed for any improper purpose, such as to harass or cause unnecessary delay or

needless increase in the cost of litigation" and is "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." [Fed. R. Civ. P. 26(g).] If a certification is made in violation of the Rule, the court shall, upon motion or upon its own initiative impose a sanction on the attorney, the party, or both, which may include an order to pay the reasonable expenses incurred because of the violation, including reasonable attorney's fees. [See *In re Byrd, Inc.*, 927 F.2d 1135 (10th Cir. 1991).]

Another arrow in the quiver of discovery abuse remedies available in federal court is the rule providing that an attorney who "so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." [See 28 U.S.C. Sec. 1927 (1988); *Roberts v. Lyons*, 131 F.R.D. 75, 77, 78 (E.D. Pa. 1990).]

Rule 26(f) of the federal rules provides for a discovery conference on motion of a party or the court's own motion. This rule

Abuse is particularly inviting when one party has greater economic strength or otherwise has greater staying power than another.

provides a device for identifying discovery issues, establishing a plan and schedule for discovery, setting limits on discovery, and the like. The parties are required to participate in good faith in framing a discovery plan, and sanctions in the form of reasonable expenses including attorney's fees are available under Rule 37 for failure to participate in good faith in forming a plan.

In Colorado, Rule 16 provides for filing a disclosure certificate 180 days in advance of trial. The certificate must be signed in conformance with Rule 11. One of the

features of such a certificate is a discovery plan specifying the type of discovery, the time frame and from whom discovery will be sought. Rule 16 also provides for optional status conferences and case management orders and requires all discovery to be completed 30 days before trial. Scheduling procedures are also available under the Federal Rules of Civil Procedure and the local rules of the federal district court.

Rule 37 of both the federal and state rules provides detailed remedies and sanctions for various forms of failure to make discovery. These include reasonable expenses, including costs and attorney's fees. A court's obligation to impose such financial sanctions in most circumstances, however, is tempered by the court's discretion to decline imposition of such sanctions if failure to provide discovery was substantially justified or if other circumstances make such monetary sanctions unjust.

Remedies under the Rules of Civil Procedure, notwithstanding their number and breadth, do not provide a complete or satisfactory answer to discovery abuse. To pursue them is time consuming and costly, with no assurance that the costs will ultimately be imposed on the opposition. Driving up the costs of litigation is itself a subject of great public concern. Many judges lack enthusiasm for consideration of discovery motions, and it may be difficult to obtain hearings or to obtain full and patient consideration when hearings are set. Judges are often reluctant to impose sanctions and to attribute improper motives to the alleged abuser of the discovery process. Trial judges also perceive a similar reluctance on the appellate bench and have little confidence that discovery sanctions, if imposed, will be upheld on appeal.

Not surprisingly, lack of satisfaction with remedies under the rules as an antidote to discovery abuse has generated proposals for other solutions. Some suggestions for improvement come readily to mind. As a modest proposal, our state Rules of Civil Procedure could be amended to adopt some of the federal rules providing a broader foundation for imposition of sanctions. In state courts Rule 26.1, providing a system of abbreviated discovery, could be employed either at the instance of the parties or on invocation by the court to limit discovery in appropriate cases. In the time since the rule has been in effect, however, anecdotal information indicates that it has not been used to any significant extent. The Colorado rules in this regard are currently under

study by the Civil Rules Committee of the Colorado Bar Association and the Denver Bar Association Committee on Professionalism.

A new development in Colorado also bears mention. New rules of professional conduct were effective January 1, 1993. They contain for the first time a specific requirement about the conduct of discovery. Rule 3.4(d) provides: "A lawyer shall not: . . . (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party." More generally, Rule 3.2 provides: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." The extent to which these rules will be utilized in attorney discipline cases remains to be seen. Actively enforced, they could be effective tools in controlling discovery abuse. Employed in doubtful situations, they could have a chilling effect on legitimate discovery efforts.

The extent of discontent with discovery abuse has reached such proportions as to give rise to suggestions for reforms of a more far-reaching nature. For instance, Judge Frank H. Easterbrook of the United States Court of Appeals for the Seventh Circuit has gone so far as to recommend the elimination of notice pleading, the return to fact pleading to formulate the factual and legal issues, and a highly structured discovery process controlled by the court, with discovery costs to be imposed on the losing parties. [*Frank H. Easterbrook, Comment, Discovery as Abuse, 69 B.U.L. Rev. 635, 643-47 (1989).*]

On the nearer horizon, a different approach to modification of discovery procedures has been fermenting in the federal system and has resulted in a proposed revision of Federal Rules 26, 29, and 30, all recently approved by the judicial conference of the United States and forwarded to the United States Supreme Court for consideration. If the Supreme Court adopts them and Congress does not reject them, the rule changes could be effective as early as December 1, 1993. [*Editor's note: These changes were adopted by the Supreme Court April 22, 1993; see the following article by Nancy Gegenheimer.*]

In place of traditional discovery the proposed revisions would require parties, without request, to disclose four categories of information early in the litigation and to update these disclosures as the litigation progresses. The first category includes identification of persons likely to have

*Lawyers must renew
their commitment to
ethical discovery and
resist the pressures
and temptations for
abuse. Judges must
take discovery
matters seriously.*

information bearing significantly on any claim or defense and identifying the subjects of this information, copies of descriptions of documents likely to bear significantly on any claim or defense, a computation of damages claimed and the materials bearing on the nature and extent of injuries suffered. The second category consists of information concerning expert witnesses, to be furnished at least 90 days before trial unless the court otherwise orders. The third consists of identification of witnesses and exhibits, to be disclosed at least 30 days before trial unless the court otherwise directs. Finally, insurance information must be disclosed.

Although the proposed rule changes would partially take the place of traditional discovery, they recognize a continuing role for conventional discovery devices and procedures. Conventional devices may be employed to obtain additional information, and the permissible subject matter scope is broad, as in the present rules. The court has jurisdiction, however, to limit or curtail discovery consistent with the needs in a particular case. Additionally, a certificate that a moving party has attempted to confer with other affected parties in an effort to resolve a discovery dispute is a condition precedent to obtaining protective orders under Rule 26(c). Finally, Rule 30 would be revised to set presumptive limits on the number and length of depositions. The proposed rule changes are detailed and complex and the foregoing list of some of the salient features of those revisions is only illustrative of the breadth of the proposed changes. [*Preliminary Draft of Proposed Rules Aug. 1991; Committee on Rules of Practice and Procedure of the Judicial Conference of the United States; Fed.R.Civ.P. 26, 137 F.R.D. 53, 66-68, 87-106.*]

Not all of the initial reaction to the proposed changes to the federal rules has been sanguine about their beneficial effects if adopted. One article suggests that uncertainty about what must be disclosed "all but guarantees the same kind (if not more) of the motion practice that now permeates our oldfangled discovery system." [Loren Kieve, *Discovery Reform*, 77 A.B.A.J. 79 (Dec. 1991).] More hyperbolically, the author suggests that the proposed changes, far from being a lifeline for a system drowning in discovery, is more like taking a drowning victim out of one river and throwing the victim into another. [*Id.* at 79.] The author proposes instead the elimination of discovery, an approach said to be that of both the English courts and civil law. [*Id.* at 81.]

What then can we conclude from all this? The extent of the critical comment and the fundamental nature of some of the proposed reforms suggest a widespread perception that discovery abuse is real and must be addressed in some manner if litigation is to be conducted in as cost-efficient manner as its intrinsic nature will permit. This climate of criticism creates the potential for wide-sweeping reforms, the most comprehensive of which arguably would throw out the baby with the bath water. After all, we can hardly quarrel with the admirable purpose of liberal discovery as set forth in *Hickman v. Taylor*, and trials conducted by fully informed adversaries should certainly produce fairer results than trial by ambush. Fairness has its price, however, and as that price becomes higher and affects more and more litigants, we can expect pressure for varying degrees of change.

What then is the answer to the problem? I have no instant or overarching solution to offer, nor do I think it admits of one. Rule changes, however well intentioned and carefully devised, I submit, are unlikely to be completely effective to control the conduct of persons who wish to abuse the procedure or succumb to pressure to do so. I have no better suggestion to offer than a strong dose of professionalism for both lawyers and judges. Lawyers must renew their commitment to ethical discovery and resist the pressures and temptations for abuse. Judges must take discovery matters seriously and overcome their aversion to discovery disputes and case management matters. Only if the fact and perception of the prevalence of abusive discovery are changed can we preserve the benefits for which our present system of liberal pretrial discovery was originally conceived.



Nancy Gegenheimer

Will Mandatory Cooperation in Discovery Curb Abuse?

Nancy J. Gegenheimer*

Introduction

On April 22, 1993, the United States Supreme Court adopted changes to the Federal Rules of Civil Procedure, to take effect December 1, 1993 barring Congressional intervention, that govern all proceedings in civil cases commenced thereafter and, to the extent just and practicable, to all proceedings in civil cases then pending. This article addresses whether the amendments to the Federal Rules of Civil Procedure governing discovery are likely to remedy discovery abuses and, if so, whether the Colorado Supreme Court should consider adopting similar changes.

The amendments preserve traditional forms of discovery including interrogatories, depositions and document requests but substantially curtail a party's ability to use these devices. In place of traditional discovery devices, the amendments opt for unilateral disclosure. Before any discovery request is served, each party is required to voluntarily disclose to the other party four categories of information:

(1) Individuals with Knowledge: The name, address and telephone number of individuals likely to have discoverable

information relevant to disputed facts alleged with particularity in the pleadings;

(2) Relevant Documents: Descriptions of documents, data compilations and tangible things in the possession, custody or control of the party relevant to disputed facts alleged with particularity in the pleadings;

(3) Damages: The computation of damages and production of documents relevant to damages; and

(4) Insurance: Production of insurance agreements.

The problem created by this amendment is the language "facts alleged with particularity in the pleadings." Despite a growing trend toward verbose and lengthy complaints, the rules still require only a short and plain statement of a claim. [See *Fed. R. Civ. P.* 8.] Generally, the rules require only fraud or mistake to be pled with particularity. [See *Fed. R. Civ. P.* 9.] While the drafters may have intended that parties would be encouraged to avoid making conclusory allegations if only facts alleged with particularity would lead to disclosure of this information, many courts are critical of lengthy complaints. [See *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 415 (9th Cir. 1985) (*dismissal of complaint exceeding 70 pages that were confusing and conclusory*).] Will the amendments simply convert discovery disputes into disputes over what is "relevant" or "pled with particularity"? Such disputes may be difficult to resolve without an amendment to Rule 8.

Under the amendments the parties are not allowed to engage in traditional discovery, absent leave of the court, until they have conducted a face-to-face mandatory discovery planning session under Rule 26(f). The parties must meet as soon as practicable, but no later than 14 days before the scheduling conference required by Rule 16(b) (meeting with the court required as soon as practicable, but in any event within 120 days after the appearance of a defendant and within 90 days after the complaint has been served on a defendant). The purpose of the Rule 26(f) meeting requirement is to: (1) discuss the nature and basis of claims and defenses; (2) discuss the possibility for prompt settlement or resolution; (3) arrange for the disclosures discussed above; and (4) develop a proposed discovery plan. The discovery plan shall include identification of subjects on which discovery may be needed, when discovery should be completed and whether discovery should be conducted in phases, or be limited to or focused on particular issues. After the parties have framed a mutually-agreed upon plan, the court must hold a discovery conference and enter an order establishing a schedule and limitations for the conduct of discovery.

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In sum, cooperation among the parties is contemplated by the amendments as well as more court participation in outlining discovery needs before the parties undertake traditional discovery techniques. Once the court has approved the discovery plan, however, traditional discovery devices may still be employed, although these devices have been substantially curtailed by the amendments.

Interrogatories and Document Requests

No interrogatories or document requests may be served before the time specified in Rule 26(d). Interrogatories are limited to 25 in number, including all discrete subparts. Leave to serve additional interrogatories can be granted by the court to the extent consistent with the principles of Rule 26(b)(2). As noted by Justice Lohr, prior to the amendment, interrogatory abuses included voluminous form interrogatories that were not adapted to a particular case, objections to interrogatories to create delay, and evasive and nonresponsive answers. The amendment to Rule 33 used in conjunction with the disclosures required by Rule 26 is designed to reduce the frequency and increase the efficiency of interrogatories.

Depositions

Justice Lohr also describes deposition abuses, which include taking multiple depositions when a smaller number would be adequate. The amendments substantially limit the number of depositions that can be taken absent leave of the court. Parties must secure leave of the court to take more than 10 depositions in a case or to examine a person more than once. No deposition can be taken before the time specified in Rule 26(d) without leave of the court or a certification that the person examined is expected to leave the United States or be unavailable for examination in this country.

Further deposition abuse includes unwarranted objections, unwarranted assertions of privilege or coaching a witness. The local rules of practice for the United States District Court for the District of Colorado specifically define abusive deposition conduct and provide sanctions for abusive deposition conduct. [See *D.C. Colo. LR 30.1C*.]

Rules Governing Abuse and Sanctions

To discourage a party from attempting to conceal or suppress harmful evidence by using an unfounded claim of privilege or work product, the federal rules have adopted an approach taken several years ago by the Tenth Circuit. The amendments mandate that when a party withholds information otherwise discoverable under a claim of privilege or work-product, the

evidence must be described without revealing information itself privileged or protected, so as to enable another party to assess the applicability of the privilege or protection. [See *Rule 26(b)(5)*.] In 1984 the Tenth Circuit held that failure to disclose documents withheld on the grounds of privilege resulted in a loss of the privilege. [See *Peat, Marwick, Mitchell Co. v. West*, 748 F. 2d 540 (10th Cir. 1984).] Suppression of documents or destruction of evidence relevant to an action should lead to default or issue preclusion. [See *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976); *Adolph Coors Co. v. American Insurance Co.*, 1993 U.S. Dist. Lexis 3732 (Mar. 4, 1993); *Wm. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455-46 (C.D. Cal. 1984).]

Cooperation among the parties is contemplated by the amendments as well as more court participation in outlining discovery needs before the parties undertake traditional discovery techniques.

Amended Rule 26(g)(3) permits the court to impose sanctions for violations of Rule 26. Rule 11 no longer applies to discovery violations and it expressly provides that it is not applicable to disclosures and discovery requests, responses, objections and motions subject to the provisions of Rules 26 through 37.

Amendment 26(g) now incorporates in discovery requests and disclosures the same certification that attorneys or parties give under Rule 11 for pleadings. The signature of an attorney or a party as to the disclosed information required by Amendment 26(a)(1) and on each discovery request, response or objection constitutes a certification that, to the best of the signer's

knowledge, information and belief, formed after reasonable inquiry: (1) the disclosure is complete and correct as of the time it was made; and (2) as to the discovery requests, (a) is consistent with the rules and warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law; (b) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (c) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy and the importance of the issues at stake in the litigation. Sanctions for a certification made in violation of the rule may include an order to pay reasonable expenses incurred in the violation, including reasonable attorney's fees.

Further sanctions are included in the amendments to Rule 37. Under the amendments, a party must certify all reasonable efforts to attempt in good faith to confer with the other party to secure the information without court intervention. Similar requirements already exist in the local rules for the District of Colorado. [See *D.C. Colo. LR 7.1*.] If a party fails to disclose information required by Rule 26(a), that party shall not be permitted to use the evidence at trial, at a hearing or on a motion. Sanctions for failure to make discovery remain the same as they were prior to the amendments as set out in Rule 37(b)(2)(A)-(E).

Conclusion

The Colorado Rules of Civil Procedure already operate in a manner similar to the federal amendments. The disclosure requirements of Amendment 26(a) as a practical matter will operate similarly to C.R.C.P. 16, Colorado's disclosure certificate requirements, effective September 1, 1990. With Colorado's requirements, parties must disclose witnesses and documents to be used at trial. The risk of being precluded from using evidence not included on a disclosure certificate or not disclosed under the federal rules is strong incentive for all parties to make a good-faith effort to disclose. C.R.C.P. 11 requires a certification which applies to discovery. The sanctions available in Rule 37 remain the same at the state and federal level. No doubt mandatory cooperation, added by the federal amendments, will help curb some discovery abuses. However, the key to success of the federal amendments or any attempt to curb discovery abuse is the imposition of severe sanctions at the trial level and upholding such sanctions at the appellate level.

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